

Before the
Federal Communications Commission
Washington, D.C. 20554

MAILED

NOV 12 2008

FCC MAIL ROOM

In the Matter of)	
)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
)	
Lifeline and Link Up	)	WC Docket No. 03-109
)	
Universal Service Contribution Methodology	)	WC Docket No. 06-122
)	
Numbering Resource Optimization	)	CC Docket No. 99-200
)	
Implementation of the Local Competition)	
Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
)	
Developing a Unified Inter-carrier Compensation)	
Regime	)	CC Docket No. 01-92
)	
Inter-carrier Compensation for ISP-Bound Traffic	)	CC Docket No. 99-68
)	
IP-Enabled Services	)	WC Docket No. 04-36

**ORDER ON REMAND AND REPORT AND ORDER
AND FURTHER NOTICE OF PROPOSED RULEMAKING**

Adopted: November 5, 2008

Released: November 5, 2008

Comment Date: (14 days after publication in the Federal Register)

Reply Comment Date: (21 days after publication in the Federal Register)

By the Commission: Chairman Martin issuing a separate statement; Commissioners Copps, Adelstein, Tate, and McDowell issuing a joint statement.

TABLE OF CONTENTS

I. ORDER ON REMAND – ISP-BOUND TRAFFIC	1
A. Background	2
B. Discussion	6
1. Scope of Section 251(b)(5)	7
2. Authority Under Section 201	17
3. Other Issues	23
II. REPORT AND ORDER – REFORM OF HIGH-COST UNIVERSAL SERVICE SUPPORT	30
A. Background	31
B. Discussion	37

III. FURTHER NOTICE OF PROPOSED RULEMAKING	38
IV. PROCEDURAL MATTERS.....	42
A. <i>Ex Parte</i> Presentations	42
B. Comment Filing Procedures	43
C. Initial Regulatory Flexibility Analysis.....	51
D. Paperwork Reduction Act	52
E. Accessible Formats	53
F. Congressional Review Act.....	54
V. ORDERING CLAUSES.....	55
APPENDIX A – Chairman’s Draft Proposal	
APPENDIX B – Narrow Universal Service Reform Proposal	
APPENDIX C – Alternative Proposal	
APPENDIX D – Relevant Ex Partes	
APPENDIX E – Initial Regulatory Flexibility Analysis	

I. ORDER ON REMAND – ISP-BOUND TRAFFIC

1. The actions we take in this order respond to the writ of mandamus granted by the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) directing the Commission to respond to its prior remand of the Commission’s intercarrier compensation rules for Internet Service Provider (ISP)-bound traffic.¹ As discussed below, we conclude that we have authority to impose ISP-bound traffic rules.

A. Background

2. On February 26, 1999, the Commission issued a Declaratory Ruling and Notice of Proposed Rulemaking in which it held that ISP-bound traffic is jurisdictionally interstate because end users access websites across state lines.² Because the *Local Competition First Report and Order* concluded that the reciprocal compensation obligation in section 251(b)(5) applied only to local traffic, the Commission found in the *Declaratory Ruling* that ISP-bound traffic is not subject to section 251(b)(5).³ On March 24, 2000, in the *Bell Atlantic* decision, the D.C. Circuit vacated certain provisions of the *Declaratory Ruling*.⁴ The court did not question the Commission’s finding that ISP-bound traffic is interstate. Rather, the court held that the Commission had not adequately explained how its end-to-end jurisdictional analysis was relevant to determining whether a call to an ISP is subject to reciprocal compensation under section 251(b)(5).⁵ In particular, the court noted that a LEC serving an ISP appears to perform the function of

¹ *In re Core Communications, Inc.*, 531 F.3d 849, 861-62 (D.C. Cir. 2008) (directing the Commission to respond to the remand in the form of a final, appealable order which explains its legal authority to issue the pricing rules for ISP-bound traffic adopted in the *ISP Remand Order*).

² See *Inter-carrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68, Declaratory Ruling and Notice of Proposed Rulemaking, 14 FCC Rcd 3689 (1999) (*Declaratory Ruling*), vacated and remanded, *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000) (*Bell Atlantic*).

³ See also *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98, 95-185, First Report and Order, 11 FCC Rcd 15499, 16013, paras. 1033-34 (1996) (subsequent history omitted) (*Local Competition First Report and Order*).

⁴ *Bell Atlantic*, 206 F.3d at 1.

⁵ See *id.* at 5.

"termination" because the LEC delivers traffic from the calling party through its end office switch to the called party, the ISP.⁶

3. On April 27, 2001, the Commission released the *ISP Remand Order*, which concluded that section 251(g) excludes ISP-bound traffic from the scope of section 251(b)(5).⁷ The Commission explained that section 251(g) maintains the pre-1996 Act compensation requirements for "exchange access, information access, and exchange services for such access," thereby excluding such traffic from the reciprocal compensation requirements that the 1996 Act imposed.⁸ The Commission concluded that ISP-bound traffic was "information access" and, therefore, was subject instead to the Commission's section 201 jurisdiction over interstate communications.⁹ The Commission also found "convincing evidence in the record" that carriers had "targeted ISPs as customers merely to take advantage of . . . intercarrier payments" (including offering free service to ISPs, paying ISPs to be their customers, and sometimes engaging in outright fraud). It therefore adopted an ISP payment regime in order to "limit, if not end, the opportunity for regulatory arbitrage."¹⁰ The Commission concluded that a bill-and-keep regime might eliminate incentives for arbitrage and force carriers to look to their own customers for cost recovery.¹¹ To avoid a flash cut to bill-and-keep, however, the Commission adopted a compensation regime pending completion of the *Inter-carrier Compensation* proceeding.¹² Specifically, the regime adopted by the Commission consisted of: (1) a gradually declining cap on intercarrier compensation for ISP-bound traffic, beginning at \$.0015 per minute-of-use and declining to \$.0007 per minute-of-use; (2) a growth cap on total ISP-bound minutes for which a LEC may receive this compensation; (3) a "new markets rule" requiring bill-and-keep for the exchange of this traffic if two carriers were not exchanging traffic pursuant to an interconnection agreement prior to the adoption of the regime; and (4) a "mirroring rule" that gave incumbent LECs the benefit of the rate cap only if they offered to exchange all traffic

⁶ See *id.* at 6.

⁷ See *Inter-carrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, Order on Remand and Report and Order, 16 FCC Rcd 9151, 9171-72, para. 44 (2001) (*ISP Remand Order*), remanded but not vacated by *WorldCom, Inc. v. FCC*, 288 F.3d 429, 432 (D.C. Cir. 2002) (*WorldCom*) (subsequent history omitted) (holding that section 251(g) appears to provide for the continued enforcement "of certain pre-Act regulatory 'interconnection restrictions and obligations'").

⁸ The term "1996 Act" refers to the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). The term "Act" refers to the Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq.*

⁹ See *ISP Remand Order*, 16 FCC Rcd at 9175, para. 52. Thus, the Commission affirmed its prior finding in the *Declaratory Ruling* that ISP-bound traffic is jurisdictionally interstate. See *id.*; see also *Declaratory Ruling*, 14 FCC Rcd at 3710-03, paras. 18-20.

¹⁰ See *ISP Remand Order*, 16 FCC Rcd at 9187, para. 77.

¹¹ *ISP Remand Order*, 16 FCC Rcd at 9184-85, paras. 74-75. The Commission discussed at length the market distortions and regulatory arbitrage opportunities created by the application of per-minute reciprocal compensation rates to ISP-bound traffic. In particular, the Commission found that requiring compensation for this type of traffic at existing reciprocal compensation rates undermined the operation of competitive markets because competitive LECs were able to recover a disproportionate share of their costs from other carriers, thereby distorting the price signals sent to their ISP customers. See *ISP Remand Order*, 16 FCC Rcd at 9181-86, paras. 67-76.

¹² See *ISP Remand Order*, 16 FCC Rcd at 9153, para. 2 (citing *Developing a Unified Inter-carrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, 16 FCC Rcd 9610 (2001) (*Inter-carrier Compensation NPRM*)).

subject to section 251(b)(5) at the same rates.¹³ These rate caps reflected the downward trend in intercarrier compensation rates contained in then-recently negotiated interconnection agreements.¹⁴

4. On May 3, 2002, the D.C. Circuit found that the Commission had not provided an adequate legal basis for the rules it adopted in the *ISP Remand Order*.¹⁵ Once again, the court did not question the Commission's finding that ISP-bound traffic is jurisdictionally interstate. Rather, the court held that section 251(g) of the Act did not provide a basis for the Commission's decision. The court held that section 251(g) is simply a transitional device that preserved obligations that predated the 1996 Act until the Commission adopts superseding rules, and that there was no pre-1996 Act obligation with respect to intercarrier compensation for ISP-bound traffic.¹⁶ Although the court rejected the legal rationale for the compensation rules, the court remanded, but did not vacate, the *ISP Remand Order* to the Commission, and it observed that "there is plainly a non-trivial likelihood that the Commission has authority" to adopt the rules.¹⁷ Accordingly, the rules adopted in the *ISP Remand Order* have remained in effect.

5. On November 5, 2007, Core filed a petition for writ of mandamus with the D.C. Circuit seeking to compel the Commission to enter an order resolving the court's remand in the *WorldCom* decision.¹⁸ On July 8, 2008, the court granted a writ of mandamus and directed the Commission to respond to the *WorldCom* remand in the form of a final, appealable order which explains its legal authority to issue the pricing rules for ISP-bound traffic adopted in the *ISP Remand Order*.¹⁹ The court directed the Commission to respond to the writ of mandamus by November 5, 2008.²⁰

B. Discussion

6. In this order, we respond to the D.C. Circuit's remand order in *WorldCom v. FCC*,²¹ and the court's writ of mandamus in *Core Communications Inc.*²² Specifically, we hold that although ISP-bound traffic falls within the scope of section 251(b)(5), this interstate, interexchange traffic is to be afforded different treatment from other section 251(b)(5) traffic pursuant to our authority under section 201 and 251(i) of the Act.

1. Scope of Section 251(b)(5)

¹³ *ISP Remand Order*, 16 FCC Rcd at 9187-89, 9193-94, paras. 78, 80, 89. In a subsequent order, the Commission granted forbearance to all telecommunications carriers with respect to the growth caps and the new markets rule. See *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order*, WC Docket No. 03-171, Order, 19 FCC Rcd 20179 (2004) (*Core Forbearance Order*). Thus, only the rate caps and mirroring rule remain in effect today.

¹⁴ See *ISP Remand Order*, 16 FCC Rcd at 9190-91, para. 85.

¹⁵ See *WorldCom*, 288 F.3d at 429.

¹⁶ See *id.* at 433.

¹⁷ See *id.* at 434.

¹⁸ Pet. for Writ of Mandamus to the Federal Communications Commission, D.C. Cir. 07-1446 (filed Nov. 5, 2007).

¹⁹ *Core Communications, Inc.*, 531 F.3d at 861-62.

²⁰ See *id.* If the Commission fails to comply with the writ by the November 5th deadline, the rules will be vacated on November 6, 2008. See *id.* at 862.

²¹ See 288 F.3d at 434.

²² See 531 F.3d at 861-62.

7. As an initial matter, we conclude that the scope of section 251(b)(5) is broad enough to encompass ISP-bound traffic. To be sure, we acknowledge that, in the *Local Competition First Report and Order*, the Commission found that section 251(b)(5) applies only to local traffic,²³ and some commenters continue to press for such an interpretation.²⁴ As other commenters recognize, however, the Commission, in the *ISP Remand Order*, reconsidered that judgment and concluded that it was a mistake to read section 251(b)(5) as limited to local traffic, given that "local" is not a term used in section 251(b)(5).²⁵ We recognize, as the Supreme Court noted in *AT&T Corp. v. Iowa Utilities Board*, that "[i]t would be a gross understatement to say that the 1996 Act is not a model of clarity."²⁶ Nevertheless, we find that the better view is that section 251(b)(5) is not limited to local traffic.

8. We begin by looking at the text of the statute. Section 251(b)(5) imposes on all LECs the "duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications."²⁷ The Act broadly defines "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."²⁸ Its scope is not limited geographically ("local," "intrastate," or "interstate") or to particular services ("telephone exchange service,"²⁹ telephone toll service,³⁰ or "exchange access"³¹). We find that the traffic we elect to bring within this framework fits squarely within the meaning of "telecommunications." We also observe that had Congress intended to preclude the Commission from bringing certain types of telecommunications traffic within the section

²³ *Local Competition First Report and Order*, 11 FCC Rcd at 16012-13, para. 1033.

²⁴ See, e.g., Supplemental Comments of Verizon and Verizon Wireless at 24-32; Letter from Daniel Mitchell, Vice President, Legal and Industry, National Cable and Telecommunications Association (NCTA), to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92 at 9 (filed Sept. 30, 2008) (NCTA Sept. 30, 2008 *Ex Parte* Letter); Verizon *Intercarrier Compensation FNPRM* Comments at 38-42; NARUC *Intercarrier Compensation FNPRM* Comments at 6-7; Rural Alliance *Intercarrier Compensation FNPRM* Comments at 144-49; Cincinnati Bell *Intercarrier Compensation FNPRM* Comments at 5-11; Maine Public Utilities Commission and Vermont Public Service Board *Intercarrier Compensation FNPRM* Comments at 7; New York State Department of Public Service *Intercarrier Compensation FNPRM* Comments at 7; Verizon and BellSouth, Supplemental White Paper on ISP Reciprocal Compensation, CC Docket No. 96-98, 99-68 at 16-20 (filed July 20, 2004) (Verizon/BellSouth Supp. ISP White Paper); NARUC's Initial Comments at 7 n.13 (May 23, 2004). But see, e.g., ICF *Intercarrier Compensation FNPRM* Comments at 39.

²⁵ *ISP Remand Order*, 16 FCC Rcd at 9166-67, para. 35. See also, e.g., Qwest, Legal Authority for Comprehensive Intercarrier Compensation Reform 2-4 (Qwest White Paper), attached to Letter from Melissa Newman, Counsel for Qwest, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-92, 06-45, 99-68, WC Docket Nos. 04-36, 05-337, 05-195, 06-122 (filed Oct. 7, 2008) (Qwest Oct. 7, 2008 *Ex Parte* Letter); Letter from Kathleen O'Brien Ham et al., Counsel for T-Mobile, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92 at 9-10 (filed Oct. 3, 2008) (T-Mobile Oct. 3, 2008 *Ex Parte* Letter); Level 3 Aug. 18, 2008 *Ex Parte* Letter at 2, 15-18; AT&T Reply to Comment Sought on Missoula Plan Phantom Traffic Interim Process Call Detail Records Proposal, CC Docket No. 01-92, Public Notice, DA 06-2294 (WCB 2006) (*Missoula Phantom Traffic*) at 35-41; Brief from Gary M. Epstein, Counsel for ICF, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92 at 29-35 (filed Oct. 5, 2004).

²⁶ *AT&T v. Iowa Utils. Bd.*, 525 U.S. at 397.

²⁷ 47 U.S.C. § 251(b)(5).

²⁸ 47 U.S.C. § 153(43).

²⁹ *Id.* § 153(47).

³⁰ *Id.* § 153(48).

³¹ *Id.* § 153(16).

251(b)(5) framework, it could have easily done so by incorporating restrictive terms in section 251(b)(5). Because Congress used the term "telecommunications," the broadest of the statute's defined terms, we conclude that section 251(b)(5) is not limited only to the transport and termination of certain types of telecommunications traffic, such as local traffic.

9. In the *Local Competition First Report and Order* the Commission concluded that section 251(b)(5) applies only to local traffic, but recognized that "[u]ltimately . . . the rates that local carriers impose for the transport and termination of local traffic and for the transport and termination of long distance traffic should converge."³² In the *ISP Remand Order*, the Commission reversed course on the scope of section 251(b)(5), finding that "the phrase 'local traffic' created unnecessary ambiguities, and we correct that mistake here."³³ The *ISP Remand Order* noted that "the term 'local,' not being a statutorily defined category, . . . is not a term used in section 251(b)(5)."³⁴ The Commission found that the scope of section 251(b)(5) is limited only by section 251(g), which temporarily grandfathered the pre-1996 Act rules governing "exchange access, information access, and exchange services for such access" provided to interexchange carriers and information service providers until "explicitly superseded by regulations prescribed by the Commission."³⁵ On appeal, the D.C. Circuit left intact the Commission's findings concerning the scope of section 251(b)(5), although it took issue with other aspects of the *ISP Remand Order*.³⁶

10. We disagree with commenters who argue that section 251(b)(5) only can be applied to traffic exchanged between LECs, and not traffic exchanged between a LEC and another carrier.³⁷ The Commission rejected that argument in the *Local Competition Order*, finding that section 251(b)(5) applies to traffic exchanged by a LEC and any other telecommunications carrier, and adopted rules implementing that finding.³⁸ In a specific application of that principle, the Commission concluded that "CMRS providers will not be classified as LECs,"³⁹ but nevertheless found that "LECs are obligated,

³² *Local Competition First Report and Order*, 11 FCC Rcd at 16012, para. 1033.

³³ *ISP Remand Order*, 16 FCC Rcd at 9173, para. 46.

³⁴ *Id.* at 9167, para. 34.

³⁵ 47 U.S.C. § 251(g).

³⁶ See *WorldCom v. FCC*, 288 F.3d at 429.

³⁷ See, e.g., Supplemental Comments of Verizon and Verizon Wireless ("The best interpretation of § 251(b)(5) – read in light of the text, structure, and history of the 1996 Act – is that the reciprocal compensation obligation applies only to intraexchange (or 'local') voice calls that originate on the network of one LEC (or wireless provider) and terminate on the network of another LEC (or wireless provider) operating in the same exchange (or, in the case of wireless providers, the same MTA."); Letter from Ann D. Berkowitz, Associate Director, Federal Regulatory Advocacy, Verizon, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 99-68, 96-98, Attach. at 26 (filed May 17, 2004) (attaching white paper entitled "Internet-Bound Traffic is Not Compensable Under Sections 251(b)(5) and 252(d)(2)") (Verizon/BellSouth White Paper) ("By its nature, 'reciprocal compensation' must [] apply to 'telecommunications' exchanged *between LECs* (or carriers, like CMRS providers, that the Commission is authorized to treat as LECs), not to traffic that is exchanged between LECs and non-LECs.") (emphasis in original).

³⁸ See *Local Competition First Report and Order*, 11 FCC Rcd at 16013-16, paras. 1034-41. See also 47 C.F.R. 51.703(a) ("Each LEC shall establish reciprocal compensation arrangements for transport and termination of telecommunications traffic with any requesting telecommunications carrier"); *ISP Remand Order*, 16 FCC Rcd at 9193-94, para. 89 n.177 ("Section 251(b)(5) applies to telecommunications traffic between a LEC and a telecommunications carrier . . .").

³⁹ *Local Competition First Report and Order*, 11 FCC Rcd at 15996, para. 1005.

pursuant to section 251(b)(5) (and the corresponding pricing standards of section 252(d)(2)), to enter into reciprocal compensation agreements with all CMRS providers.⁴⁰ No one challenged that finding on appeal, and it has been settled law for the past 12 years. We see no reason to revisit that conclusion now. While section 251(b)(5) indisputably imposes the duty to establish reciprocal compensation arrangements on LECs alone, Congress did not limit the class of potential beneficiaries of that obligation to LECs.⁴¹

11. We also disagree with commenters who argue that section 252(d)(2)(A)(i) limits the scope of section 251(b)(5).⁴² Section 252(d)(2)(A)(i) provides that a state commission "shall not consider the terms and conditions for reciprocal compensation to be just and reasonable" unless "such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier."⁴³ Verizon and others argue that this provision necessarily excludes interexchange traffic from the scope of section 251(b)(5), because at the time the 1996 Act was passed calls neither originated nor terminated on an interexchange carrier's network.⁴⁴ We reject this reasoning because it erroneously assumes that Congress intended the pricing standards in section 252(d)(2) to limit the otherwise broad scope of section 251(b)(5). We do not believe that Congress intended the tail to wag the dog.

12. Section 251(b)(5) defines the scope of traffic that is subject to reciprocal compensation. Section 252(d)(2)(A)(i), in turn, deals with the mechanics of who owes what to whom, it does not define the scope of traffic to which section 251(b)(5) applies. Section 252(d)(2)(A)(i) provides that, at a minimum, a reciprocal compensation arrangement must provide for the recovery by each carrier of costs associated with the transport and termination on each carrier's network of calls that originate on the network of the other carrier.⁴⁵ Section 252(d)(2)(A)(i) does not address what happens when carriers exchange traffic that originates or terminates on a third carrier's network. This does not mean, as Verizon suggests, that section 251(b)(5) must be read as limited to traffic involving only two carriers. Rather, it means that there is a gap in the pricing rules in section 252(d)(2), and the Commission has authority under section 201(b) to adopt rules to fill that gap.

13. We also reject Verizon's argument that a telecommunications carrier that delivers traffic to an ISP is not eligible for reciprocal compensation because the carrier does not "terminate"

⁴⁰ *Local Competition First Report and Order*, 11 FCC Rcd at 15997, para. 1008.

⁴¹ If Congress had intended to limit the class of potential beneficiaries of LECs' duty to establish reciprocal obligation arrangements, it would have said so explicitly. See 47 U.S.C. § 251(b)(3) (describing the "duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service").

⁴² See, e.g., Verizon/BellSouth White Paper at 41-43; New York State Department of Public Service *Inter-carrier Compensation FNPRM* Comments at 8-9; TDS *Inter-carrier Compensation FNPRM* Comments at 19 n.27; VeriSign *Inter-carrier Compensation FNPRM* Comments, Attach B. at 9, 12, 26-28; Qwest *Inter-carrier Compensation FNPRM* Comments at 39; NASUCA *Inter-carrier Compensation FNPRM* Reply at 17; Leap Wireless International, Inc. *Inter-carrier Compensation FNPRM* Reply, Ex. 5 at 8.

⁴³ 47 U.S.C. § 252(d)(2)(A)(i).

⁴⁴ See, e.g., Maine Public Utilities Commission and Vermont Public Service Board *Inter-carrier Compensation FNPRM* Comments at 7-8; New York State Department of Public Service *Inter-carrier Compensation FNPRM* Comments at 7-10; Verizon/BellSouth Supp. ISP White Paper at 16-20; NARUC *Inter-carrier Compensation FNPRM* Initial Comments at 7 n.13.

⁴⁵ 47 U.S.C. § 252(d)(2)(A)(i).

telecommunications traffic at the ISP.⁴⁶ In the *Local Competition Order*, the Commission defined "termination" as "the switching of traffic that is subject to section 251(b)(5) at the terminating carrier's end office switch ... and delivery of that traffic to the called party's premises."⁴⁷ As the D.C. Circuit suggested in the *Bell Atlantic* decision, "Calls to ISPs appear to fit this definition: the traffic is switched by the LEC whose customer is the ISP and then delivered to the ISP, which is clearly the 'called party.'"⁴⁸ We agree.⁴⁹

14. Verizon also argues that the reference to reciprocal compensation in the competitive checklist in section 271,⁵⁰ which was designed to ensure that local markets are open to competition, somehow shows that Congress intended to limit the scope of section 251(b)(5) to local traffic.⁵¹ We do not see how this argument sheds any light on the scope of section 251(b)(5). Congress no doubt included the reference to reciprocal compensation in section 271 because section 251(b)(5) applies to local traffic, a point that no one disputes. That does not suggest, however, that section 251(b)(5) applies *only* to local traffic.

15. We need not respond to every other variation of the argument that the history and structure of the Act somehow demonstrate that section 251(b)(5) is limited to local traffic. At best, these arguments show that one plausible interpretation of the statute is that section 251(b)(5) applies only to local traffic, a view that the Commission embraced in the *Local Competition First Report and Order*. These arguments do not persuade us, however, that this is the only plausible reading of the statute. Moreover, many of the same arguments based on the history and context of the adoption of section 251 to limit its scope to local traffic were rejected by the D.C. Circuit in the context of section 251(c).⁵² We find that the better reading

⁴⁶ See, e.g., Supplemental Comments of Verizon and Verizon Wireless at 33-34; Verizon/BellSouth White Paper at 31-32.

⁴⁷ *Local Competition Order*, 11 FCC Rcd at 16015, para. 1040. See also 47 C.F.R. § 51.701(d).

⁴⁸ 206 F.3d at 6.

⁴⁹ We reject Verizon's argument against the application of section 251(b)(5) to ISP-bound traffic because this traffic is one-way traffic and as such is not reciprocal, see Supplemental Comments of Verizon and Verizon Wireless at 26 (Oct. 2, 2008); Verizon White Paper at 41-43 (May 17, 2004). As Level 3 points out, these arguments have been rejected by the Commission and the U.S. Court of Appeals for the Ninth Circuit. See Level 3 Aug. 18, 2008 *Ex Parte* Letter at 18; *Pacific Bell v. Cook Telecom, Inc.*, 197 F.3d 1236, 1242-44 (9th Cir. 1999) (reciprocal compensation applies to paging traffic); *TSR Wireless, LLC v. U.S. West Communications, Inc.*, 15 FCC Rcd 11166, 11178 para. 21 (2000) (the Commission's reciprocal compensation rules "draw [] no distinction between one-way and two-way carriers"). Because our conclusion in this order concerning the scope of section 251(b)(5) is no longer tied to whether this traffic is local or long distance, we need not address arguments made by the parties as to whether ISP-bound traffic constitutes "telephone exchange service" under the Act. See e.g., Letter from John T. Nakahata, Counsel for Level 3 Communications, LLC, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket Nos. 99-68, 96-98, Attach. at 1 (filed Sept. 24, 2004).

⁵⁰ See 47 U.S.C. § 271(c)(2)(B)(xiii).

⁵¹ See Supplemental Comments of Verizon and Verizon Wireless at 26; Verizon/BellSouth White Paper at 9.

⁵² *United States Telecom Association v. FCC*, 359 F.3d 554, 592 (D.C. Cir. 2004) (*USTA II*), cert. denied sub nom., *Nat'l Ass'n of Regulatory Utility Comm'rs v. United States Telecom Ass'n*, 543 U.S. 925, 125 S. Ct. 313, 160 L.Ed.2d 223 (2004) ("Even under the deferential *Chevron* standard of review, an agency cannot, absent strong structural or contextual evidence, exclude from coverage certain items that clearly fall within the plain meaning of a statutory term. The argument that long distance services are not 'telecommunications services' has no support."). In *USTA II*, the D.C. Circuit was addressing whether the term "telecommunications services" was limited to local

(continued....)

of the Act as a whole, in particular the broad language of section 251(b)(5) and the grandfather clause in section 251(g), supports our view that the transport and termination of all telecommunications exchanged with LECs is subject to the reciprocal compensation regime in sections 251(b)(5) and 252(d)(2).

16. Notwithstanding section 251(b)(5)'s broad scope, we agree with the finding in the *ISP Remand Order* that traffic encompassed by section 251(g) is excluded from section 251(b)(5) except to the extent that the Commission acts to bring that traffic within its scope. Section 251(g) preserved the pre-1996 Act regulatory regime that applies to access traffic, including rules governing "receipt of compensation."⁵³ Here, however, the D.C. Circuit has held that ISP-bound traffic did not fall within the section 251(g) carve out from section 251(b)(5) as "there had been *no* pre-Act obligation relating to intercarrier compensation for ISP-bound traffic."⁵⁴ As a result, we find that ISP-bound traffic falls within the scope of section 251(b)(5).

2. Authority Under Section 201

17. The section 251(b)(5) finding above, however, does not end our legal analysis here. That is because the ISP-bound traffic at issue here is clearly interstate in nature and thus also subject to our section 201 authority. The Commission unquestionably has authority to regulate intercarrier compensation with respect to interstate access services, rates charged by CMRS providers, and other traffic subject to Commission authority such as ISP-bound traffic. Section 2(a) of the Act establishes the Commission's jurisdiction over interstate services, for which the Commission ensures just, reasonable, and not unjustly and unreasonably discriminatory rates under section 201 and 202.⁵⁵ Likewise, the Commission has authority over the rates of CMRS providers pursuant to section 332 of the Act.⁵⁶

18. In sections 251 and 252 of the Act, Congress altered the traditional regulatory framework based on jurisdiction by expanding the applicability of national rules to historically intrastate issues and state rules to historically interstate issues.⁵⁷ In the *Local Competition First Report and Order*, the Commission found that the 1996 Act created parallel jurisdiction for the Commission and the states over interstate and intrastate matters under sections 251 and 252.⁵⁸ The Commission and the states "are to address the same matters through their parallel jurisdiction over both interstate and intrastate matters under sections 251 and 252."⁵⁹ Moreover, section 251(i) provides that "[n]othing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201."⁶⁰ In the *Local Competition First Report and Order*, the Commission concluded that section 251(i) "affirms that the Commission's preexisting authority under section 201 continues to apply for purely interstate

(continued from previous page) _____

telecommunications services under section 251(c), while here we consider the analogous question of whether "telecommunications" is limited to local telecommunications under section 251(b).

⁵³ 47 U.S.C. 251(g).

⁵⁴ *WorldCom*, 288 F.3d at 433.

⁵⁵ 47 U.S.C. §§ 152(a), 201, 202.

⁵⁶ 47 U.S.C. § 332.

⁵⁷ *Local Competition First Report and Order*, 11 FCC Rcd at 15544, para. 83.

⁵⁸ *Id.* at 15544-45, para. 85.

⁵⁹ *Id.*

⁶⁰ 47 U.S.C. § 251(i).

activities.”⁶¹

19. In implementing sections 251 and 252 in the *Local Competition First Report and Order*, the Commission’s treatment of LEC-CMRS traffic provides an instructive example. Prior to the 1996 Act, the Commission expressly preempted “state and local regulations of the kind of interconnection to which CMRS providers are entitled” based on its authority under section 201 and 332 of the Act.⁶² Nevertheless, in the *Local Competition First Report and Order*, the Commission brought LEC-CMRS interconnection within the section 251 framework as it relates to intraMTA (including interstate intraMTA) traffic.⁶³ The Commission recognized, however, that it continued to retain separate authority over CMRS traffic.⁶⁴

20. Courts confirmed that, in permitting LEC-CMRS interconnection to be addressed through the section 251 framework, the Commission did not in any way lose its independent jurisdiction or authority to regulate that traffic under other provisions of the Act. Thus, although the Eighth Circuit invalidated the Commission’s TELRIC pricing rules in general,⁶⁵ it recognized that “because section 332(c)(1)(B) gives the FCC the authority to order LECs to interconnect with CMRS carriers, we believe that the Commission has the authority to issue the rules of special concern to the CMRS providers, [including the reciprocal compensation rules] but only as these provisions apply to CMRS providers. Thus, [the pricing] rules . . . remain in full force and effect with respect to the CMRS providers, and our order of vacation does not apply to them in the CMRS context.”⁶⁶ Subsequently, the D.C. Circuit held that CMRS providers were entitled to pursue formal complaints under section 208 of the Act for violations of the Commission’s reciprocal compensation rules.⁶⁷

21. We build upon our actions in the *Local Competition First Report and Order* and find here that addressing ISP-bound traffic through the section 251 framework does not diminish the Commission’s independent jurisdiction or authority to regulate traffic under other provisions of the Act. Specifically, we retain our authority under section 201 to regulate ISP-bound traffic, despite acknowledging that such traffic is section 251(b)(5) traffic. With respect to interstate services, the Act has long provided us with the authority to establish just and reasonable “charges, practices, classifications, and regulations.”⁶⁸ The Commission thus retains full authority to regulate charges for traffic and services subject to federal jurisdiction, even when it is within the sections 251(b)(5) and 252(d)(2) framework. Because we reaffirm our findings concerning the interstate nature of ISP-bound traffic, which have not been vacated by

⁶¹ *Local Competition First Report and Order* at 15546–47, para. 91.

⁶² *Implementation of Sections 3(n) and 332*, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1498, para. 230 (1994).

⁶³ See *Local Competition First Report and Order*, 11 FCC Rcd at 16005, para. 1023.

⁶⁴ *Id.* (“By opting to proceed under sections 251 and 252, we are not finding that section 332 jurisdiction over interconnection has been repealed by implication, or rejecting it as an alternative basis for jurisdiction.”).

⁶⁵ We note that the Supreme Court later reversed this decision and affirmed the TELRIC methodology. See *Verizon Commc’ns, Inc. v. FCC*, 535 U.S. 467 (2002) (*Verizon v. FCC*).

⁶⁶ *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 800 n.21 (8th Cir. 1997) (*Iowa Utils. Bd.*) (vacated and remanded in part on other grounds, *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) (*AT&T v. Iowa Utils. Bd.*)).

⁶⁷ See *Qwest Corp. v. FCC*, 252 F.3d 462, 465-66 (D.C. Cir. 2001) (describing the Eighth Circuit’s analysis of section 332(c)(1)(B) in *Iowa Utils. Bd. v. FCC* and concluding that an attempt to relitigate the issue was barred by the doctrine of issue preclusion).

⁶⁸ 47 U.S.C. § 201(b).

any court, it follows that such traffic falls under the Commission's section 201 authority preserved by the Act and that we therefore have the authority to issue pricing rules pursuant to that section.⁶⁹ This conclusion is reinforced by section 251(i) of the Act. As the Commission explained in the *ISP Remand Order*, section 251(i) "expressly affirms the Commission's role in an evolving telecommunications marketplace, in which Congress anticipates that the Commission will continue to develop appropriate pricing and compensation mechanisms for traffic that falls within the purview of section 201."⁷⁰ It concluded that section 251(i), together with section 201, equips the Commission with the tools necessary to keep pace with regulatory developments and new technologies.⁷¹ When read together, these statutory sections preserve the Commission's authority to address new issues that fall within its section 201 authority over interstate traffic, including compensation for the exchange of ISP-bound traffic. Consequently, in the *ISP Remand Order*, the Commission properly exercised its authority under section 201(b) to issue pricing rules governing the payment of compensation between carriers for ISP-bound traffic.⁷²

22. Our result today is consistent with the D.C. Circuit's opinion in *Bell Atlantic*, which concluded that the jurisdictional nature of traffic is not dispositive of whether reciprocal compensation is owed under section 251(b)(5).⁷³ It is also consistent with the D.C. Circuit's *WorldCom* decision, in which the court rejected the Commission's view that section 251(g) excluded ISP-bound traffic from the scope

⁶⁹ We have consistently found that ISP-bound traffic is jurisdictionally interstate. ISP-bound traffic melds a traditional circuit-switched local telephone call over the PSTN to packet switched IP-based Internet communication to Web sites. See e.g., *Declaratory Ruling*, 14 FCC Rcd at 3702, para. 18; *ISP Remand Order*, 16 FCC Rcd at 9175, para. 52. This conclusion has not been questioned by the D.C. Circuit. See *WorldCom*, 288 F.3d at 431; *Bell Atlantic v. FCC*, 206 F.3d at 5 ("There is no dispute that the Commission has historically been justified in relying on this method when determining whether a particular communication is jurisdictionally interstate."). In other contexts, the Commission has likewise found that services that offer access to the Internet are jurisdictionally interstate services. In 1998, for example, the Commission found that ADSL service is jurisdictionally interstate. See *GTE Tel. Operating Cos.*, CC Docket No. 98-79, Memorandum Opinion and Order, 13 FCC Rcd 22466, 22481, para. 28 (1998) ("finding that GTE's ADSL service is subject to federal jurisdiction" and is "an interstate service"). More recently, the Commission has confirmed this ruling for a variety of broadband Internet access services. See *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4832, para. 59 (2002) (finding that, "on an end-to-end analysis," "cable modem service is an interstate information service"); *Wireline Broadband Internet Access Order*, 20 FCC Rcd 14853 at 14914, para. 110 (2005), *aff'd by Brand X*, 545 U.S. 967; *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT 07-53, Declaratory Ruling, 22 FCC Rcd 5901, 5911, para. 28 (2007); *United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, WC 06-10, Memorandum Opinion and Order, 21 FCC Rcd 13281, 13288, para. 11 (2006). In the *Vonage Order*, the Commission likewise found that VoIP services are jurisdictionally interstate, employing the same end-to-end analysis reflected in those other orders. *Vonage Order*, 19 FCC Rcd at 22413-14, paras. 17-18.

⁷⁰ *ISP Remand Order*, 16 FCC Rcd at 9174, para. 50.

⁷¹ See *ISP Remand Order*, at 9175, para. 51.

⁷² We thus respond to the D.C. Circuit's remand order in *WorldCom*, 288 F.3d at 434, and the court's writ of mandamus in *Core Communications*, 531 F.3d at 861-62, which directed the Commission to explain its legal authority to issue the pricing rules for ISP-bound traffic adopted in the *ISP Remand Order*. Specifically, we find, for the reasons set forth here that the Commission had the authority to adopt the pricing regime pursuant to our broad authority under section 201(b) to issue rules governing interstate traffic.

⁷³ See *Bell Atlantic*, 206 F.3d at 5.

of section 251(b)(5), but made no other findings.⁷⁴ Finally, this result does not run afoul of the Eighth Circuit's decision on remand from the Supreme Court in the *Iowa Utilities Board* litigation, which held that "the FCC does not have the authority to set the actual prices for the state commissions to use" under section 251(b)(5).⁷⁵ At the time of that decision, under the *Local Competition First Report and Order*, section 251(b)(5) applied only to local traffic. Thus, the Eighth Circuit merely held that the Commission could not set reciprocal compensation rates for local traffic. The court did not address the Commission's authority to set reciprocal compensation rates for interstate traffic.⁷⁶ In sum, the Commission plainly has authority to establish pricing rules for interstate traffic, including ISP-bound traffic, under section 201(b), and that authority was preserved by section 251(i).

3. Other Issues

23. Most commenters urge the Commission to maintain the compensation rules governing ISP-bound traffic until the Commission is able to complete comprehensive intercarrier compensation reform.⁷⁷ These parties contend that a higher compensation rate would create new opportunities for arbitrage⁷⁸ and

⁷⁴ See *WorldCom*, 288 F.3d at 434.

⁷⁵ *Iowa Utils. Bd. v. FCC*, 219 F.3d 744, 757 (8th Cir. 2000) (*Iowa Utils. II*), *rev'd in part sub nom. Verizon v. FCC*, 535 U.S. 467.

⁷⁶ Indeed, above, the court expressly confirmed the Commission's independent authority to set rates for CMRS traffic pursuant to section 332 and declined to vacate the Commission's pricing rules as they applied in the context of CMRS service. See *Iowa Utils. I*, 120 F.3d at 800 n.21.

⁷⁷ See, e.g., Letter from Gregory J. Vogt, Counsel for CenturyTel, Inc. to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-337; CC Docket Nos. 96-45, 01-92, Attach. at 10 (filed July 8, 2008) (asking the Commission to maintain the existing compromises reached with respect to ISP-bound traffic); Letter from Gary L. Phillips, Associate General Counsel, AT&T, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-92, 96-98, 99-68 at 8 (filed May 9, 2008) (asserting that the public interest would be best served by maintaining the existing transitional rates pending broader intercarrier compensation reform); Letter from L. Charles Keller, Counsel for Sage Telecom, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 99-68, 01-92, Attach. at 6 (Sage Telecom May 9, 2008 *Ex Parte* Letter) (stating that retaining the ISP rate serves broad policy goals); Letter from John T. Nakahata, Counsel for Level 3 Communications to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-92, 99-68 at 1 (filed May 7, 2008) (supporting continuation of the compensation rules); Letter from Joshua Seidmann, Vice President of Regulatory Affairs, Independent Telephone & Telecommunications Alliance, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 99-68, 96-98, Attach. at 2 (filed Apr. 28, 2008) (ITTA Apr. 28, 2008 *Ex Parte* Letter) (asking the Commission to retain the current \$0.0007 rate for ISP-bound traffic); Letter from Donna Epps, Vice President of Federal Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 99-68, 96-98 (filed Apr. 7, 2008) (urging the Commission to support its earlier finding that \$0.0007 is appropriate compensation for dial-up ISP traffic); Letter from L. Charles Keller, Counsel to Verizon Wireless, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-92, 99-68, Attach. (filed May 1, 2008) (Verizon Wireless May 1, 2008 *Ex Parte* Letter) (describing how elimination of the existing ISP rate would create substantial burdens on a number of carriers and state commissions); Letter from Glenn Reynolds, Vice President, Policy, USTelecom, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-92, 99-68, 96-262, WC Docket No. 07-135 at 2 (filed Apr. 29, 2008) (USTelecom Apr. 29, 2008 *Ex Parte* Letter) (noting that the Commission's existing rules have "largely mitigated the debate around compensation for ISP-bound traffic, but there is every reason to believe the same problems would arise if the Commission were to reverse direction on this issue").

⁷⁸ See, e.g., USTelecom Apr. 29, 2008 *Ex Parte* Letter at 2; Letter from Melissa E. Newman, Vice President, Federal Regulatory, Qwest Communications International, Inc., to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 99-68, 96-98, WC Docket No. 07-135, Attach. at 3-5 (filed Apr. 25, 2008) (Qwest April 25, 2008 *Ex Parte* Letter); Verizon and BellSouth, Further Supplemental White Paper on ISP Reciprocal Compensation at 20 (Verizon/BellSouth Further Supp. ISP White Paper), attached to Letter from Donna Epps, Vice President, Federal

(continued....)

impose substantial financial burdens on wireless companies; incumbent LECs and state public utility commissions.⁷⁹ They further claim that the existing regime has simplified interconnection negotiations.⁸⁰

24. In the *ISP Remand Order*, the Commission found that the one-way nature of ISP-bound traffic creates significant arbitrage opportunities. Due to the unbalanced nature of ISP-bound traffic, the Commission observed that reciprocal compensation arrangements created enormous incentives for competitive LECs to sign up ISPs as customers.⁸¹ The Commission cited evidence that competitive LECs, on average, terminated eighteen times more traffic than they originated, resulting in annual CLEC reciprocal compensation billings of approximately two billion dollars, 90 percent of which was for ISP-bound traffic.⁸² The Commission concluded that "the record strongly suggests that CLECs target ISPs in large part because of the availability of reciprocal compensation payments."⁸³ This undermined the operation of competitive markets because competitive LECs were able to recover a disproportionate share of their costs from other carriers.⁸⁴ To limit arbitrage opportunities that arose from "excessively high reciprocal compensation rates,"⁸⁵ the Commission adopted a gradually declining cap on intercarrier compensation for ISP-bound traffic, beginning at \$.0015 per minute of use and declining to \$.0007 per minute of use, the current cap.⁸⁶ The Commission derived the rate caps from contemporaneous interconnection agreements, in which carriers voluntarily agreed to rates comparable to the rate caps adopted by the Commission.⁸⁷ The interconnection agreements included lower rates for unbalanced traffic than for balanced traffic, and the rates declined over time, like the rate caps.⁸⁸ Although the Commission made no specific findings with regard to the actual costs associated with delivering traffic to ISPs, it noted evidence in the record that technological advances were reducing the costs incurred by carriers when handling all forms of traffic.⁸⁹ The Commission also noted that "negotiated reciprocal compensation rates continue to decline as ILECS and CLECs negotiate new agreements."⁹⁰

25. On July 14, 2003, Core Communications, Inc. ("Core") filed a petition pursuant to Section 10

(continued from previous page)

Regulatory Advocacy, Verizon, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 96-98, 99-68 (filed Sept. 27, 2004).

⁷⁹ See, e.g., Verizon Wireless May 1, 2008 *Ex Parte* Letter, Attach.

⁸⁰ See, e.g., *id.* (stating that "the [m]irroring [r]ule simplified wireless-ILEC interconnection negotiations tremendously"); Supplemental Comments of Verizon and Verizon Wireless on Intercarrier Payments for ISP-Bound Traffic and the *WorldCom* Remand, CC Docket Nos. 01-92, 96-98, 99-68 at 38-40 (filed Oct. 2, 2008) (Supplemental Comments of Verizon and Verizon Wireless) (indicating that Verizon entered into multiple agreements using the \$.0007 rate cap established in the *ISP Remand Order*).

⁸¹ *Id.* at 9182-83, para. 68-71.

⁸² *Id.* at 9183, para. 70.

⁸³ *Id.*

⁸⁴ *Id.* at para. 71.

⁸⁵ *Id.* at 9185, para. 75.

⁸⁶ *Id.* at 9187, para. 78.

⁸⁷ *Id.* at 9190-91, para. 85.

⁸⁸ *Id.*

⁸⁹ *Id.* at 9190, para. 84.

⁹⁰ *Id.*

of the Communications Act⁹¹ requesting that the Commission forbear from enforcing the rate caps and certain other provisions set forth in the *ISP Remand Order* with respect to the exchange of ISP-bound traffic between telecommunications carriers. In 2004, the Commission denied the petition with respect to rate caps and the mirroring rule, determining that Core had satisfied none of the three prongs of the statutory test for forbearance.⁹² First, the Commission found that forbearance from enforcement of the rate caps was not consistent with the public interest. To the contrary, the Commission concluded that rate caps remained necessary to prevent regulatory arbitrage and to promote efficient investment in telecommunications services and facilities.⁹³ Second, the Commission found limited potential for discrimination under the rate caps. The caps applied to ISP-bound traffic only to the extent that an incumbent carrier offered to exchange all traffic at the same rate under Section 251(b)(5).⁹⁴ Accordingly, the Commission concluded that Core had not proven that the rate caps resulted in impermissible discrimination against or between competitive carriers or services.⁹⁵ Finally, the Commission found that Core had not demonstrated that enforcement of the rate caps was not necessary for the protection of consumers. Core advanced speculative general claims that the caps caused artificially high rates, had forced competitive carriers from the market, and had deterred investment in telecommunications services, all to consumers' detriment. The Commission rejected these unsupported claims, explaining that the rate caps were designed to prevent the subsidization of dial-up Internet access customers at the expense of consumers of basic telephone service and to avoid regulatory arbitrage and discrimination between services.⁹⁶ For these reasons, the Commission denied Core's petition for forbearance insofar as rate caps were concerned.⁹⁷

26. In 2006, the D.C. Circuit affirmed our decision not to forbear from the rate cap (and the mirroring rule).⁹⁸ The Court found reasonable the Commission's "view that the rate caps are necessary to prevent the subsidization of dial-up Internet access consumers by consumers of basic telephone service"

⁹¹ See 47 U.S.C. § 160(a) ("[T]he Commission shall forbear from applying any regulation or any provision of [the Communications] Act to a telecommunications carrier . . . if the Commission determines that (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable, and are not unjustly or unreasonably discriminatory; (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest.").

⁹² See *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(C) From Application of the ISP Remand Order*, 19 FCC Rcd 20179 (2004) ("Forbearance Order").

⁹³ The Commission rejected as an initial matter Core's argument that the D.C. Circuit's decision in *WorldCom, Inc. v. FCC*, 288 F.3d 429 (2002), *cert. denied*, 538 U.S. 1012 (2003), compelled the agency to grant the petition, observing that the court remanded but did not vacate the rules adopted in the *ISP Remand Order* and specifically found a "non-trivial likelihood" that the Commission would be able to justify the regime it adopted. See *Forbearance Order*, 19 FCC Rcd at 20185 para. 17 (quoting *Worldcom*, 288 F.3d at 434).

⁹⁴ See 47 U.S.C. § 251(b)(5) (imposing upon local exchange carriers the "duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications").

⁹⁵ See *Forbearance Order*, 19 FCC Rcd at 20187 para. 23.

⁹⁶ *Id.* at 20188 para. 25.

⁹⁷ *Id.* at 20189 para. 29.

⁹⁸ *In re Core Communications, Inc.*, 455 F.3d 267 (D.C. Cir. 2006).

that would occur if reciprocal compensation rates applied to one-way ISP-bound traffic.⁹⁹ The Court likewise rejected Core's contention that the rate cap was "unreasonably discriminatory," both because one-way ISP-bound calls were fundamentally different from other forms of traffic and because the mirroring rule ensures that "the caps apply to ISP-bound traffic only if an incumbent LEC offers to exchange all Section 251(b)(5) traffic at the same rate."¹⁰⁰ Finally, the Court concluded that the Commission's concern that the rate cap was necessary to prevent "regulatory arbitrage" and "distorted economic incentives" was reasonable.¹⁰¹

27. The policy justifications provided by the Commission in 2001 for the rules at issue here have not been questioned by any court. In addition, the policy justifications provided by the Commission for refusing to forbear from enforcement of these rules were upheld by the D.C. Circuit in 2006. We therefore disagree with parties who suggest that the Commission, in responding to the D.C. Circuit's remand in *WorldCom*, must offer detailed new justifications for the ISP intercarrier payment regime¹⁰². We have already offered our justifications for that regime. Moreover, both the *Worldcom* remand and *Core* writ of mandamus focused on the issue of legal authority. We also reject arguments that the Commission unlawfully delegated its authority in the *ISP Remand Order* and arguments that the Commission addressed previously in the *Core Forbearance Order*.¹⁰³

28. The Commission long has stated its intention to move to a more unified intercarrier compensation regime. Progress is difficult due to competing priorities, such as competition, innovation, universal service, and other goals. The Commission recognized in 2001 that ISP-bound traffic represented a unique arbitrage problem that required immediate attention, based on the policy concerns discussed above. The Commission remains committed to moving towards a more unified intercarrier compensation regime, as evidenced by the Further Notice issued in conjunction with this order.

29. In sum, we maintain the \$.0007 cap and the mirroring rule pursuant to our section 201 authority. These rules shall remain in place until we adopt more comprehensive intercarrier compensation reform.

II. REPORT AND ORDER – REFORM OF HIGH-COST UNIVERSAL SERVICE SUPPORT

30. In this report and order, we address the "Recommended Decision" of the Federal-State Joint Board on Universal Service (Joint Board), which was released on November 20, 2007.¹⁰⁴ As discussed

⁹⁹ *Id.* at 278.

¹⁰⁰ *Id.* (citing *Forbearance Order*, 19 FCC Rcd at 20187, para. 23).

¹⁰¹ *Id.* at 279.

¹⁰² See Letter from Michael B. Hazzard, Counsel to Core Communications, to Marlene H. Dortch, FCC, CC Docket Nos. 99-68, 01-92, Attach. at 20-26 (May 14, 2008).

¹⁰³ See Core May 14, 2008 Response at 18 & n.8, 19-20. The Commission did not delegate its authority in the *ISP Remand Order*, but rather provided options that were not mandatory. See, e.g., *ISP Remand Order*, 16 FCC Rcd at 9193, para. 89. Additionally, Core argues that the Commission provided no reasoned explanation for the growth cap and new markets rules adopted in the *ISP Remand Order* and never provided notice or an opportunity for comment on those specific rules. These rules, as applicable to all carriers, were forborne from in the *Core Forbearance Order*. See *Core Forbearance Order*, 19 FCC Rcd at 20186-87, paras. 20-21. As such, this argument is moot.

¹⁰⁴ *High-Cost Universal Service Support; Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45, Recommended Decision, 22 FCC Rcd 20477 (JB 2007) (*Comprehensive Reform Recommended Decision*).

below, we appreciate the great efforts expended by the Joint Board and its staff in considering how best to reform the current high-cost support mechanism and in developing its recommendations. We choose not to implement the recommendations contained in the *Comprehensive Reform Recommended Decision* at this time, however.

A. Background

31. The 1996 Act amended the Communications Act of 1934 with respect to the provision of universal service.¹⁰⁵ In the 1996 Act, Congress sought to preserve and advance universal service, while at the same time opening all telecommunications markets to competition.¹⁰⁶ Section 254(b) of the Act directs the Joint Board and the Commission to base policies for the preservation and advancement of universal service on several general principles, plus other principles that the Commission may establish.¹⁰⁷ Among other things, section 254(b) directs that there should be specific, predictable, and sufficient federal and state universal service support mechanisms; quality services should be available at just, reasonable, and affordable rates; and access to advanced telecommunications and information services should be provided in all regions of the nation.¹⁰⁸

32. The Commission implemented the universal service provisions of the 1996 Act in the 1997 *Universal Service First Report and Order*.¹⁰⁹ Among other things, the Commission adopted rules to create explicit universal service support mechanisms for customers living in rural and high cost areas. Pursuant to section 254(e) of the Act, an entity must be designated as an eligible telecommunications carrier (ETC) to receive high-cost universal service support.¹¹⁰ ETCs may be incumbent LECs, or non-incumbent LECs, which are referred to as "competitive ETCs."¹¹¹ Under the existing high-cost support distribution mechanism, incumbent LEC ETCs receive high-cost support for their intrastate services based on their costs.¹¹² Competitive ETCs receive support for each line based on the support the incumbent LEC would receive for that line in the service area.¹¹³ This support to competitive ETCs is known as "identical support." The Commission's universal service high-cost support rules do not distinguish between primary and secondary lines; therefore, high-cost support may go to a single end user

¹⁰⁵ 47 U.S.C. § 254 (added by the 1996 Act).

¹⁰⁶ 47 U.S.C. § 254.

¹⁰⁷ See 47 U.S.C. § 254(b).

¹⁰⁸ 47 U.S.C. § 254(b)(1), (2), (5).

¹⁰⁹ See *Universal Service First Report and Order*, 12 FCC Rcd at 8780-88, paras. 1-20.

¹¹⁰ 47 U.S.C. § 254(e). The statutory requirements for ETC designation are set out in section 214(e) of the Act. 47 U.S.C. § 214(e).

¹¹¹ See 47 C.F.R. § 54.5 ("A 'competitive eligible telecommunications carrier' is a carrier that meets the definition of 'eligible telecommunications carrier' below and does not meet the definition of an 'incumbent local exchange carrier' in § 51.5 of this chapter.").

¹¹² Non-rural incumbent LEC ETCs receive support for their intrastate supported services based on the forward-looking economic cost of providing the services. 47 C.F.R. § 54.309. Rural incumbent LEC ETCs receive support based on their loop costs, as compared to a national average. 47 C.F.R. Part 36, sbpt. F; 47 C.F.R. § 54.305. Incumbent LEC ETCs that serve study areas with 50,000 or fewer lines receive support based on their local switching costs. 47 C.F.R. § 54.301. Additionally, incumbent LEC ETCs that are subject to price cap or rate-of-return regulation receive interstate access support based on their revenue requirements. 47 C.F.R. Part 54, sbpts. J, K.

¹¹³ 47 C.F.R. § 54.307(a).

for multiple connections.¹¹⁴ Further, the Commission's rules result in subsidizing multiple competitors in the same high-cost area.

33. High-cost support for competitive ETCs has grown rapidly over the last several years, placing extraordinary pressure on the federal universal service fund.¹¹⁵ In 2001, high-cost universal service support totaled approximately \$2.6 billion.¹¹⁶ By 2007, the amount of high-cost support had grown to approximately \$4.3 billion per year.¹¹⁷ In recent years, this growth has been due mostly to increased support provided to competitive ETCs, which receive high-cost support based on the per-line support that the incumbent LECs receive pursuant to the identical support rule. Competitive ETC support, in the six years from 2001 through 2007, has grown from under \$17 million to \$1.18 billion—an annual growth rate of over 100 percent.¹¹⁸ This “funded competition” has grown significantly in a large number of rural, insular, or high-cost areas; in some study areas more than 20 competitive ETCs currently receive support.¹¹⁹

34. To address the growth in competitive ETC support, the Joint Board recommended an interim cap on the amount of high-cost support available to competitive ETCs, pending comprehensive high-cost universal service reform.¹²⁰ The Commission adopted this recommendation on May 1, 2008.¹²¹

35. For the past several years, the Joint Board and the Commission have been exploring ways to

¹¹⁴ See *Universal Service First Report and Order*, 12 FCC Rcd at 8828–30, paras. 94–96.

¹¹⁵ Support for the fund derives from assessments paid by providers of interstate telecommunications services and certain other providers of interstate telecommunications. See 47 C.F.R. § 54.706. Fund contributors are permitted to, and almost always do, pass those assessments through to their end-user customers. See 47 C.F.R. § 54.712. Fund assessments paid by contributors are determined by applying the quarterly contribution factor to the contributors' contribution base revenues. In the second quarter of 2007, the contribution factor reached 11.7 percent, which is the highest level since its inception. See *Proposed Second Quarter 2007 Universal Service Contribution Factor*, CC Docket No. 96-45, Public Notice, 22 FCC Rcd 5074, 5077 (OMD 2007). The contribution factor has since declined to 11.4 % in the fourth quarter of 2008. *Proposed Fourth Quarter 2008 Universal Service Contribution Factor*, CC Docket No. 96-45, Public Notice, DA 08-2091 (OMD 2008).

¹¹⁶ See FCC, UNIVERSAL SERVICE MONITORING REPORT, tbl. 3.2 (2007) (2007 UNIVERSAL SERVICE MONITORING REPORT), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-279226A1.pdf.

¹¹⁷ UNIVERSAL SERVICE ADMINISTRATIVE COMPANY, 2007 ANNUAL REPORT 43 (2007) (USAC 2007 ANNUAL REPORT), available at http://www.usac.org/_res/documents/about/pdf/usac-annual-report-2007.pdf.

¹¹⁸ 2007 UNIVERSAL SERVICE MONITORING REPORT at tbl. 3.2; USAC 2007 ANNUAL REPORT at 45.

¹¹⁹ See USAC Quarterly Administrative Filings for 2008, Fourth Quarter (4Q) Appendices, HC03—Rural Study Areas with Competition—4Q2008, available at <http://www.usac.org/about/governance/fcc-filings/2008/Q4/HC03%20-%20Rural%20Study%20Areas%20with%20Competition%20-%204Q2008.xls> (showing 24 competitive ETCs in the study area of incumbent LEC Iowa Telecom North (study area code 351167), and 22 competitive ETCs in the study area of incumbent LEC Iowa Telecom Systems (study area code 351170)).

¹²⁰ *High-Cost Universal Service Support; Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45, Recommended Decision, 22 FCC Rcd 8998, 8999–9001, paras. 4–7 (JB 2007) (*Interim Cap Recommended Decision*).

¹²¹ *Interim Cap Recommended Decision*, 22 FCC Rcd at 8999–9001, paras. 4–7; *Interim Cap Order*, 23 FCC Rcd at 8834. As recommended by the Joint Board, the Commission capped competitive ETC support for each state. *Interim Cap Recommended Decision*, 22 FCC Rcd at 9002, para. 9; *Interim Cap Order*, 23 FCC Rcd at 8846, paras. 26–28. The Commission set the cap at the level of support competitive ETCs were eligible to receive during March 2008. *Interim Cap Order*, 23 FCC Rcd at 8850, para. 38.

reform the Commission's high-cost program. In the most recent high-cost support comprehensive reform efforts, the Joint Board issued a recommended decision on November 20, 2007.¹²² The Universal Service Joint Board's recommended decision included several recommendations to address the growth in high cost support and to reform the high cost mechanisms.¹²³ Specifically, the Universal Service Joint Board recommended that the Commission should: (1) deliver high-cost support through a provider of last resort fund, a mobility fund, and a broadband fund;¹²⁴ (2) cap the high-cost fund at \$4.5 billion, the approximate level of 2007 high-cost support;¹²⁵ (3) reduce the existing funding mechanisms during a transition period;¹²⁶ (4) add broadband and mobility to the list of services eligible for support under section 254 of the Act;¹²⁷ (5) eliminate the identical support rule;¹²⁸ and (6) "explore the most appropriate auction mechanisms to determine high-cost universal service support."¹²⁹

36. On January 29, 2008, the Commission released the *Joint Board Comprehensive Reform NPRM*, seeking comment on the Joint Board's *Comprehensive Reform Recommended Decision*.¹³⁰ Pursuant to section 254(a)(2), the Commission "shall complete any proceeding to implement subsequent recommendations from any Joint Board on universal service within one year after receiving such recommendations."¹³¹

B. Discussion

37. We have carefully reviewed the Joint Board's *Comprehensive Reform Recommended Decision* and the comments that were filed in response to the Commission's *Joint Board Comprehensive Reform NPRM*. We thank the Joint Board and its staff for their hard work in studying these difficult issues and in developing their recommendations. We choose not to implement these recommendations at this time, however.

III. FURTHER NOTICE OF PROPOSED RULEMAKING

38. In enacting the Act, Congress sought to introduce competition into local telephone service, which traditionally was provided through regulated monopolies. Recognizing that in introducing such competition, it was threatening the implicit subsidy system that had traditionally supported universal service, it directed the Commission to reform its universal service program to make support explicit and sustainable in the face of developing competition.

¹²² *Comprehensive Reform Recommended Decision*, 22 FCC Rcd 20477.

¹²³ *Comprehensive Reform Recommended Decision*, 22 FCC Rcd at 20478, para. 1.

¹²⁴ *Comprehensive Reform Recommended Decision*, 22 FCC Rcd at 20480-81, para. 11.

¹²⁵ *Comprehensive Reform Recommended Decision*, 22 FCC Rcd at 20484, para. 26.

¹²⁶ *Comprehensive Reform Recommended Decision*, 22 FCC Rcd at 20484, para. 27.

¹²⁷ *Comprehensive Reform Recommended Decision*, 22 FCC Rcd at 20481-82, paras. 12-18.

¹²⁸ *Comprehensive Reform Recommended Decision*, 22 FCC Rcd at 20486, para. 35.

¹²⁹ *Comprehensive Reform Recommended Decision*, 22 FCC Rcd at 20478, paras. 1-6.

¹³⁰ *High-Cost Universal Service Support; Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45, Notice of Proposed Rulemaking, 23 FCC Rcd 1467 (2008) (*Identical Support NPRM*); *High-Cost Universal Service Support; Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45, Notice of Proposed Rulemaking, 23 FCC Rcd 1495 (2008) (*Reverse Auctions NPRM*); *Joint Board Comprehensive Reform NPRM*, 23 FCC Rcd 1531 (collectively the *High-Cost Reform NPRMs*).

¹³¹ 47 U.S.C. § 254(a)(2).

39. The communications landscape has undergone many fundamental changes that were scarcely anticipated when the 1996 Act was adopted. The Internet was only briefly mentioned in the 1996 Act,¹³² but now has come into widespread use, with broadband Internet access service increasingly viewed as a necessity. Consistent with this trend, carriers are converting from circuit-switched networks to IP-based networks. These changes have benefited consumers and should be encouraged. Competition has resulted in dramatically lower prices for telephone service, and the introduction of innovative broadband products and services has fundamentally changed the way we communicate, work, and obtain our education, news, and entertainment. At the same time, however, these developments have challenged the outdated regulatory assumptions underlying our universal service and intercarrier compensation regimes, forcing us to reassess our existing approaches. We have seen unprecedented growth in the universal service fund, driven in significant part by increased support for competitive ETCs. The growth of competition also has eroded the universal service contribution base as the prices for interstate and international services have dropped. Finally, we have seen numerous competitors exploit arbitrage opportunities created by a patchwork of above-cost intercarrier compensation rates.

40. We seek comment today on three specific proposals. The first, attached as Appendix A, is the Chairman's Draft Proposal circulated to the Commission on October 15, 2008, which was placed on the Commission's agenda for a vote on November 4, 2008. This item subsequently was removed from the Agenda on November 3, 2008.¹³³ The second, attached as Appendix B, is a Narrow Universal Service Reform Proposal circulated to the Commission on October 31, 2008. The third, attached as Appendix C, is a draft Alternative Proposal first circulated by the Chairman on the evening of November 5, 2008. Appendix C incorporates changes proposed in the *ex parte* presentations attached as Appendix D. We note that members of industry, Congress, and the general public have urged the Commission to seek comment on these proposals.

41. We seek particular comment on two questions. First, should the additional cost standard utilized under § 252(d)(2) of the Act be: (i) the existing TELRIC standard; or (ii) the incremental cost standard described in the draft order? Second, should the terminating rate for all § 251(b)(5) traffic be set as: (i) a single, statewide rate; or (ii) a single rate per operating company?

IV. PROCEDURAL MATTERS

A. *Ex Parte* Presentations

42. The rulemaking this Further Notice initiates shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.¹³⁴ Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented generally is required.¹³⁵ Other requirements pertaining to oral and written presentations are set forth in section 1.1206(b) of the Commission's rules.¹³⁶

B. Comment Filing Procedures

¹³² See 47 U.S.C. § 230; 47 U.S.C. § 157 nt.

¹³³ See http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-286532A1.pdf.

¹³⁴ 47 C.F.R. § 1.200 *et seq.*

¹³⁵ See 47 C.F.R. § 1.1206(b)(2).

¹³⁶ 47 C.F.R. § 1.1206(b).

43. Pursuant to sections 1.415 and 1.419 of the Commission's rules,¹³⁷ interested parties may file comments and reply comments regarding the Further Notice on or before the dates indicated on the first page of this document. **All filings should refer to CC Docket Nos. 96-45, 96-98, 99-68, 99-200, 01-92 and WC Docket Nos. 03-109, 04-36, 05-337, and 06-122.** Comments may be filed using: (1) the Commission's Electronic Comment Filing System (ECFS); (2) the Federal Government's e-Rulemaking Portal, or; (3) by filing paper copies. See Electronic Filing of Documents in Rulemaking Proceedings, 63 FR 24121 (1998).

44. **Electronic Filers:** Comments may be filed electronically using the Internet by accessing the ECFS: <http://www.fcc.gov/cgb/ecfs/> or the Federal e-Rulemaking Portal: <http://www.regulations.gov>. Filers should follow the instructions provided on the website for submitting comments.

45. ECFS filers must transmit one electronic copy of the comments for CC Docket Nos. 96-45, 96-98, 99-68, 99-200, 01-92 and WC Docket Nos. 03-109, 04-36, 05-337, and 06-122, respectively. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to ecfs@fcc.gov, and include the following words in the body of the message, "get form." A sample form and directions will be sent in response.

46. **Paper Filers:** Parties who choose to file by paper must file an original and four copies of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Marlene H. Dortch, Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554.

47. The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.

48. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

49. U.S. Postal Service first-class, Express, and Priority mail should be addressed to 445 12th Street, S.W., Washington D.C. 20554. Parties should send a copy of their filings to Victoria Goldberg, Pricing Policy Division, Wireline Competition Bureau, Federal Communications Commission, Room 5-A266, 445 12th Street, S.W., Washington, D.C. 20554, and to Jennifer McKee, Telecommunications Access Policy Division, Wireline Competition Bureau, Federal Communications Commission, Room 5-A423, 445 12th Street, S.W., Washington, D.C. 20554, or by e-mail to cpdcopies@fcc.gov. Parties shall also serve one copy with the Commission's copy contractor, Best Copy and Printing, Inc. (BCPI), Portals II, 445 12th Street, S.W., Room CY-B402, Washington, D.C. 20554, (202) 488-5300, or via e-mail to fcc@bcpiweb.com.

50. Documents in CC Docket Nos. 96-45, 96-98, 99-68, 99-200, 01-92 and WC Docket Nos. 03-109, 04-36, 05-337, and 06-122 will be available for public inspection and copying during business hours at the FCC Reference Information Center, Portals II, 445 12th Street S.W., Room CY-A257, Washington, D.C. 20554. The documents may also be purchased from BCPI, telephone (202) 488-5300, facsimile (202) 488-5563, TTY (202) 488-5562, e-mail fcc@bcpiweb.com.

¹³⁷ 47 C.F.R. §§ 1.415, 1.419.

C. Initial Regulatory Flexibility Analysis

51. As required by the Regulatory Flexibility Act of 1980,¹³⁸ the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities of the policies and rules addressed in this document. The IRFA is set forth as Appendix E. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the Notice provided on or before the dates indicated on the first page of this Notice.

D. Paperwork Reduction Act

52. This document contains proposed new or modified information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104-13. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198,¹³⁹ we seek specific comment on how we might "further reduce the information collection burden for small business concerns with fewer than 25 employees."

E. Accessible Formats

53. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice) or 202-418-0432 (TTY). Contact the FCC to request reasonable accommodations for filing comments (accessible format documents, sign language interpreters, CART, etc.) by e-mail: FCC504@fcc.gov; phone: 202-418-0530 or TTY: 202-418-0432.

F. Congressional Review Act

54. The Commission will include a copy of this **ORDER ON REMAND AND REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING** in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act. See 5 U.S.C. § 801(a)(1)(A).

V. ORDERING CLAUSES

55. Accordingly, IT IS ORDERED that, pursuant to Sections 1-4, 201-209, 214, 218-220, 224, 251, 252, 254, 303(r), 332, 403, 502, and 503 of the Communications Act of 1934, as amended, and Sections 601 and 706 of the Telecommunications Act of 1996, 47 U.S.C. §§ 151-154, 157 nt, 201-209, 214, 218-220, 224, 251, 252, 254, 303(r), 332, 403, 502, 503, and sections 1.1, 1.411-1.429, and 1.1200-1.1216 of the Commission's rules, 47 C.F.R. §§ 1.1, 1.411-1.429, 1.1200-1.1216, the ORDER ON REMAND AND REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING ARE ADOPTED.

56. IT IS FURTHER ORDERED, in light of the opinion of the United States Court of Appeals for the District of Columbia Circuit in *WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), we consider our obligations met from the writ of mandamus issued in *In re Core Communications, Inc. on Petition for Writ of Mandamus to the Federal Communications Commission*, D.C. Cir. No. 07-1446 (decided July 8, 2008).

¹³⁸ See 5 U.S.C. § 603.

¹³⁹ See 44 U.S.C. § 3506(c)(4).

57. IT IS FURTHER ORDERED that this FURTHER NOTICE OF PROPOSED RULEMAKING SHALL BECOME EFFECTIVE on the date of publication of the text of a summary thereof in the Federal Register, pursuant to 47 C.F.R. §§ 1.4, 1.13.

58. IT IS FURTHER ORDERED that this ORDER ON REMAND AND REPORT AND ORDER SHALL BE EFFECTIVE upon release.

59. IT IS FURTHER ORDERED that the Commission's Consumer & Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this ORDER ON REMAND AND REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

Chairman's Draft Proposal

In the Matter of)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
Lifeline and Link Up	)	WC Docket No. 03-109
Universal Service Contribution Methodology	)	WC Docket No. 06-122
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
Developing a Unified Inter-carrier Compensation Regime	)	CC Docket No. 01-92
Inter-carrier Compensation for ISP-Bound Traffic	)	CC Docket No. 99-68
IP-Enabled Services	)	WC Docket No. 04-36
Numbering Resource Optimization	)	CC Docket No. 99-200

**ORDER ON REMAND AND REPORT AND ORDER
AND FURTHER NOTICE OF PROPOSED RULEMAKING**

Adopted: "Insert Adopted Date"

Released: "Insert Release Date"

Comment Date: [XX days after date of publication in the Federal Register]

Reply Comment Date: [XX days after date of publication in the Federal Register]

TABLE OF CONTENTS

Heading	Paragraph #
I. INTRODUCTION.....	1
II. REFORM OF HIGH-COST UNIVERSAL SERVICE SUPPORT	4
A. Background.....	5
B. Discussion.....	12
1. Controlling the Growth of the High-Cost Fund	14
2. Conditioning Support on Offering Broadband Internet Access Service	19
a. Definition of Broadband Internet Access Service.....	24
b. Broadband Internet Access Service Obligations.....	25
3. Incumbent LECs' Commitment to Offer Broadband	28
4. Reverse Auctions for Study Areas Unserved by Broadband.....	32
a. Geographic Area.....	35
b. Reserve Price	36

c. Auctioned Support	38
d. Selecting a Winning Bid	43
e. Bidder Qualifications	48
5. Competitive Eligible Telecommunications Carriers	51
a. Background	51
b. Certification by Existing Competitive ETCs	52
c. Calculation of Support	53
6. Build-Out Milestones and Monitoring, Compliance, and Enforcement	57
III. BROADBAND FOR LIFELINE/LINK UP CUSTOMERS	64
A. Background	65
B. Discussion	71
1. Available Funding	77
2. Eligible Services and Equipment	80
3. Selection Criteria	85
4. Implementation and Reporting Requirements	88
5. Program Oversight	91
IV. REFORM OF UNIVERSAL SERVICE CONTRIBUTIONS	92
A. Background	93
B. Discussion	97
1. Legal Authority	98
2. The New Numbers-Based Assessment Methodology for Residential Services	105
a. Benefits of a Numbers-Based Contribution Methodology	106
b. Assessable Numbers	115
3. Contribution Assessment Methodology for Business Services	130
4. Wireless Prepaid Plans	135
5. Exceptions to Contribution Obligations	140
6. Reporting Requirements and Recordkeeping	147
7. Transition to New Methodology	154
V. REFORM OF INTERCARRIER COMPENSATION	157
A. A Brief History of Intercarrier Compensation	159
1. Intercarrier Compensation Regulation Before the Telecommunications Act of 1996	160
2. Intercarrier Compensation Regulation Since the 1996 Act	169
3. Problems Associated With the Existing Intercarrier Compensation Regimes	178
B. Comprehensive Reform	186
1. Introduction	186
2. A New Approach to Intercarrier Compensation	188
3. Legal Authority	207
a. Legal Authority for Comprehensive Reform—Interpretation of Sections 251(b)(5) and 251(g)	207
b. Legal Authority for the Transition	230
4. Additional Costs Standard	236
a. Background	237
b. The Importance of Incremental Cost In Regulated Pricing	240
c. The Incremental Cost of Call Termination on Modern Networks	253
d. Reconsideration of Additional Costs Standard	262
C. Implementation	269
1. Direction to the States	270
a. Setting Final Reciprocal Compensation Rates Based on Incremental Cost	271
b. Symmetry	276

c. Modifications and Suspensions under Section 251(f)(2).....	282
d. Existing Agreements.....	291
2. Revenue Recovery Opportunities.....	294
a. <i>End-User Charges</i>	296
b. Universal Service Support.....	311
D. Measures to Ensure Proper Billing.....	326
1. Introduction.....	326
2. Background.....	327
3. Discussion.....	329
a. Signaling Information.....	330
b. Financial Responsibilities.....	336
VI. FURTHER NOTICE OF PROPOSED RULEMAKING.....	343
A. Universal Service Contributions.....	343
B. Intercarrier Compensation Further Notice.....	345
VII. PROCEDURAL MATTERS.....	350
A. <i>Ex Parte</i> Presentations.....	350
B. Comment Filing Procedures.....	351
C. Initial Regulatory Flexibility Analysis.....	362
D. Final Regulatory Flexibility Analysis.....	363
E. Paperwork Reduction Act.....	364
F. Accessible Formats.....	365
G. Congressional Review Act.....	366
VIII. ORDERING CLAUSES.....	367

I. INTRODUCTION

1. In enacting the Telecommunications Act of 1996 (1996 Act),¹ Congress sought to introduce competition into local telephone service, which traditionally was provided through regulated monopolies. Recognizing that in introducing such competition, it was threatening the implicit subsidy system that had traditionally supported universal service, it directed the Commission to reform its universal service program to make support explicit and sustainable in the face of developing competition.

2. For the most part, Congress's vision has been realized. Competition in local telephone markets has thrived. At the same time, the communications landscape has undergone many fundamental changes that were scarcely anticipated when the 1996 Act was adopted. The Internet was only briefly mentioned in the 1996 Act,² but now has come into widespread use, with broadband Internet access service increasingly viewed as a necessity. Consistent with this trend, carriers are converting from circuit-switched networks to Internet Protocol (IP)-based networks. These changes have benefited consumers and should be encouraged. Competition has resulted in dramatically lower prices for telephone service, and the introduction of innovative broadband products and services has fundamentally changed the way we communicate, work, and obtain our education, news, and entertainment. At the same time, however, these developments have challenged the outdated regulatory assumptions underlying our universal service and intercarrier compensation regimes, forcing us to reassess our existing approaches. We have seen unprecedented growth in the universal service fund, driven in significant part by increased support for competitive eligible telecommunications carriers (ETCs). The growth of competition also has eroded the universal service contribution base as the prices for interstate and international services have

¹ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (1996 Act).

² See 47 U.S.C. § 230; 47 U.S.C. § 157 nt.

dropped. Finally, we have seen numerous competitors exploit arbitrage opportunities created by a patchwork of above-cost intercarrier compensation rates. Although the Commission has attempted to address many of these issues on a case-by-case basis, it has become increasingly clear that piecemeal efforts to respond to these developments are inadequate—only comprehensive reform can address the fundamental challenges that they present.³

3. Today we adopt a comprehensive approach to addressing these difficult, but critical issues. First, we spur widespread deployment of broadband by ensuring that carriers receiving universal service high-cost support offer broadband throughout their service areas. Second, we help Lifeline/Link Up customers participate in this new broadband world by creating a pilot program to provide discounted access to broadband services. Third, we broaden and stabilize our universal service contribution base through equitable and non-discriminatory contributions. Fourth, having placed our universal service fund on solid footing, we now take the long-overdue step of moving toward uniform intercarrier compensation rates that provide efficient incentives for the investment in and use of broadband networks. Finally, our approach minimizes disruptions to carriers and safeguards universal service for consumers by adopting sensible transition plans and ensuring that universal service is used to support service in high-cost areas, not carriers' dividends.

II. REFORM OF HIGH-COST UNIVERSAL SERVICE SUPPORT

4. Today we take a monumental step toward our goal of ensuring that broadband is available to all Americans. We do this by requiring that all recipients of high-cost support offer broadband Internet access service to all customers within their supported areas as a condition of receiving future support. Taking this action will promote the deployment of broadband Internet access service to all areas of the nation, including high-cost, rural, and insular areas where customers may not currently have access to such services. In particular, as a condition of receiving continued high-cost support, we will require all incumbent local exchange carriers (LECs) to commit to offer broadband Internet access service within five years to all customers in study areas where the incumbent LECs receive high-cost support. Competitive eligible telecommunications carriers (ETCs) likewise will be required to commit to offer broadband Internet access services to all customers in their service areas within five years to continue to receive high-cost support, which will be distributed based on the competitive ETCs' own costs. Competitive ETCs that do not make this commitment will not be eligible to receive high-cost support; incumbent LECs that do not make this commitment will gradually lose their high-cost support, as this support will be awarded via reverse auction to an ETC who will meet carrier of last resort obligations and will commit to offering broadband Internet access to all customers in the entire study area within ten years. With these reforms, we take great strides toward ensuring that all Americans, regardless of where they live, will have broadband Internet access service available to them, without increasing the size of the high-cost fund.

³ We thus conclude that there is a compelling need to proceed with comprehensive reform at this time, as we describe below. *See, e.g., infra* Parts II.A, III.A, IV.A, and V.B. Given that we have notice and an extensive record, going back in some cases seven years, we are unpersuaded by commenters proposing that we delay reform to seek further comment, or that we issue a Further Notice of Proposed Rulemaking on questions beyond those raised in Part VI. *See, e.g.,* Letter from Ray Baum, Chairman, NARUC Communications Committee, to Chairman Kevin J. Martin, et al., FCC, CC Docket Nos. 01-92, 80-286, WC Docket Nos. 08-152, 04-32, 06-122, WT Docket No. 05-194 at 2 (filed Oct. 21, 2008) (NARUC Oct. 21, 2008 *Ex Parte* Letter); Letter from Jeffery S. Lanning, Embarq, to Chairman Kevin J. Martin, et al., FCC, CC Docket Nos. 01-92, 99-68, WC Docket No. 04-36 at 2 (filed Oct. 28, 2008) (Embarq Oct. 28, 2008 *Ex Parte* Letter); Letter from Eric N. Einhorn, Windstream, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-92, 96-45, 99-68, WC Docket Nos. 06-122, 07-135, 08-152 at 1 (filed October 27, 2008) (Windstream Oct. 27, 2008 *Ex Parte* Letter).